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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 867

CHARLES JOSEPH BATTAGLIA, JR.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, Charles Joseph Battaglia, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on October 4, 1967.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been reported and is provided as Appendix "A" hereto.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on October 4, 1967. By order dated October 24, 1967, the Honorable William O. Douglas extended the petitioner's time in which to file a petition for a writ of certiorari to and including the 2nd day of December, 1967.

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

Questions Presented

(1) Does the removal of a single pool table from the corner of a local bowling alley because of threats sufficiently obstruct or affect interstate commerce so as to justify the invocation of Federal criminal sanctions under the Hobbs Act where the table was purchased locally although of out-of-state manufacture; in such a circumstance is there not a failure of proof of a Hobbs Act offense?

(2) Where the Government admits extensive and pervasive eavesdropping directed against a defendant, is it not error for the District Court to refuse to permit the defendant to explore the authorization and detailed nature of the admitted bugging and to refuse to permit counsel to endeavor to develop the existence of bugging which has not been disclosed by restricting counsel to inquiry as to whether the Government's trial evidence was derived from the Government's admitted bugs?

(3) Does not any electronic intrusion by police agents into the confidential relationship between the target of a police investigation and his attorney, who later represents him when the indictment is filed, presumptively require reversal, and therefore did not both the District Court and the Court of Appeals err in holding such intrusion harmless unless it developed evidence which the Government adduced at the trial?

(4) In addition to the suppression remedy, should not this Court in the exercise of its supervisory powers over

the administration of Federal criminal justice bar absolutely the prosecution of any offense which the Government has sought to discover by the planting of secret microphones in a man's home as part of a pervasive electronic surveillance?

The Statute and Constitutional Provisions Involved

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Title 18 of the United States Code, Section 1951 provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c.645, 62 Stat. 793.

Statement

Petitioner was convicted of violating the Hobbs Act (Title 18 United States Code, § 1951) by extortionately obtaining "space" and a share of the profits in a single coin-operated pool table (Indictment C.T. 4).* The Government's bill of particulars (C.T. 22) and indeed the opinion of the Court of Appeals make it clear that the case turns upon "a coin-operated pool table" (Appendix A, *infra* 2a-6a).

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* C.T. refers to the transcript prepared by the Clerk of the Circuit Court of Appeals of the indictment, motion and other documents, which was designated as Volume I of the record in the Court of Appeals; R.T. refers to the reporter's stenographic transcript of the trial which is in two volumes and covers the proceedings of January 11, 19 and 20, and is numbered consecutively; R.H. refers to the reporter's transcript of the hearing on the defendant's motion to suppress in connection with the electronic eavesdropping which took place on January 16 and 18.

On the 17th of February 1967, the Hon. William N. Goodwin, who had heard the case without a jury, sentenced Battaglia to ten years imprisonment and a fine of ten thousand dollars. Battaglia is at liberty on bail.

A special circumstance in connection with the trial of this case arose when on the proverbial eve of trial the Department of Justice came forth to reveal to the Court that it had just learned of the use of extensive trespass electronic surveillance, or "bugging", of the defendant Battaglia at his home, his place of business, a motel where he stayed briefly and an apartment which he sometimes visited.

We reserve to our treatment of the Reasons for Granting the Writ a more detailed statement of the necessary facts. However, no fair understanding of the case may be had without noting at the outset what is implicit but evident throughout the entire course of the proceedings and what became part of the record during the pre-trial hearing on the so-called bugging: Battaglia's name appeared on a list which made him, as one of the FBI agents in the case testified, a target of their efforts to develop a criminal case against him. The heart of our contention is that that zeal resulted in a conviction which, however satisfying to the compilers of the list, cannot be squared with the Constitutional standards for the fair and orderly administration of justice which regulate the conduct of criminal investigations and trials in the Federal courts.

Reasons for Granting the Writ

A. The scope of the Hobbs Act and the failure of proof against the appellant require reversal.

Taking the Government's proof in the light most favorable to it, and indeed adopting for the purposes of the petition in its essential outline the statement of the facts set forth in the opinion of the Court of Appeals, Appendix A, *infra* 1a-4a, we find that in essence Battaglia, through the vehicle of Tucson Vending and Amusement Company, placed certain vending and amusement machines in a bowling alley operated by one Greenwell, the Government's principal witness and the victim of the alleged extortion. The proprietor of a cocktail bar concession installed an apparently very profitable coin-operated pool table device and thereupon persuaded Greenwell to go shares on the purchase of another table which was placed in the bowling alley proper. Battaglia and Greenwell remonstrated and Battaglia allegedly threatened Greenwell and his wife. The cocktail lounge operator was unwilling to go along with the understanding reached after the argument between Greenwell and Battaglia to the effect that Battaglia was to purchase the pool table and thereafter share in the profits, and thereafter the pool table in the bowling alley was slashed. After the slashing the pool table was removed and replaced with one from Tucson Vending and Amusement Company. Put in another way, Battaglia and Greenwell had a commercial understanding about vending machines to be placed in the bowling alley and it was the Government's proof that Battaglia effected the removal of the single controverted machine by the use of threats. Both the machine which was removed and the machine

which replaced it were ordered from sources within the state, though their original manufacture was clearly outside the state.

We think an important and broadly significant point is raised as to the extent to which the Federal government may intervene to punish local extortions on the basis of some speculative, hypothetical or de minimus effect on interstate commerce. It can hardly be argued seriously that a robbery in which a gold inlay is knocked out and a wristwatch stolen violates the Hobbs Act, even though the gold came from interstate or foreign commerce and would have to be replaced from an ultimately interstate or foreign source; nor would the fact that the watch was of Swiss origin and perhaps of greater price than the pool table here justify a Federal intervention.

In *Stirone* v. *United States*, 361 U.S. 212 (1960), this Court, while deciding the case on grounds of variance, found "difficult" the question of resting a Hobbs Act conviction upon the interference of construction of a steel mill which would, when completed, send its product into the stream of interstate commerce (*Id.* at 215). In so doing we think the Court perforce lent great weight to the language of Judge Hastie in the court below when he wrote:

> 'The extortionate threat was made against a local supplier of mixed concrete. It is entirely speculative whether or not preventing this single materialman from furnishing mixed concrete on the construction job he was serving would have affected even future interstate commerce. Was concrete in abundant or short supply? Were there other materialmen ready and anxious to supply without delay the concrete needed for the job? The record tells us noth-

ing. But without some proof that the loss of this supplier would in fact have some delaying effect on the eventual productivity of the mill, any suggested ultimate effect even on interstate commerce several steps removed is speculative to an extreme degree. It is true that "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." See United States v. Women's Sportswear Mfgs. Ass'n, 1949, 336 U.S. 460, 464, 69 S. Ct. 714, 716, 93 L. Ed. 805. But this figure of speech carries with it the idea that the "squeeze" must be real and the "pinch" uncomfortably perceptible.

On the present record no more can be said than that what was done to an entirely local business might conceivably have future impact on commerce. Most certainly not even a likelihood of actual impact upon interstate commerce can properly be said to have been proved beyond reasonable doubt. Yet that at least was the burden the government undertook to bear in this criminal case.

Finally, it should be considered and kept in mind that the control and punishment of local extortion is primarily the business of local or state government. The Hobbs Act is an auxiliary and partially duplicating federal superimposition on state law enforcement. In view of Congress this is a desirable measure of federal assistance to the states in the exercise of their police power. But where state power and responsibility are thus primary and the national government is merely performing an auxiliary function, we should not be eager to stretch federal jurisdiction to cover doubtful cases offering only a tenuous or speculative theory of federal jurisdiction. See Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 1948, 13 Law and Contemporary Problems, 64, 70. We should insist

> that federal jurisdiction be clear before imposing federal sanctions in an area of primarily local concern.' (*United States* v. *Stirone*, 262 F. 2d 571 [3rd Cir., 1958] at 579.)

This case does not involve the traditional Hobbs Act labor violation nor a racketeering scheme turning upon the proceeds of interstate television broadcasts of sporting events as in *Carbo* v. *United States*, 314 F. 2d 718 (9th Cir. 1963). Mr. Greenwell's business, the Diamond Pin Lanes bowling alley was located on a side street in Tucson and the business was, in his own phrase, "Tusconian" (R.T. 157). We think the ambit of the Federal anti-racketeering statute is a question of wide importance to the administration of justice. We respectfully submit that in this case the Government has pushed its criminal jurisdiction beyond the scope of its statutory authority in order to "get" someone whose name appeared on a list prepared somewhere within the police functions of the Department of Justice. Lists of undesirables prepared by secret police agencies do not have so notable a history of contributing either to freedom or law and order. We respectfully urge that convictions which grow out of such lists deserve especial scrutiny.

B. The violation of Battaglia's Constitutional rights by the Government's trespass electronic eavesdropping and the failure to accord him a proper hearing or extend to him an adequate remedy require reversal.

1. The Background; The Hearing; The Government's admissions; the perjury of FBI Agent Johnson; the choking off of the inquiry into the details of the admitted bugging and the efforts to disclose non-admitted bugging.

On January 11th, just before the trial was scheduled to open, Mr. J. F. Cunningham, a Department of Justice attorney, disclosed to the Court and counsel the existence of trespass electronic surveillance in connection with the case. (R.T. 6-28) Accordingly the matter was set over until January 16th, at which time a hearing was set on a motion made by the defendant (R.T. 63) to dismiss the indictment and to suppress any direct or indirect fruits of any illegal bugging and alleging violations of the defendant's Third, Fourth, Fifth, Sixth and Ninth amendment rights. At the opening of the hearing, Mr. Cunningham, who handled this aspect of the case, after reviewing the statement of the Solicitor General and the policy of the Department of Justice, told the Court:

> "Acting upon that, Your Honor, the Criminal Division was first notified that there had been microphone surveillances in this case on Friday a week ago, January 6th. The Organized Crime Section on Monday obtained the logs that had been made in connection with the surveillances and I reviewed those on the following day on Tuesday, January 10th. Immediately thereafter I left for Tucson in order to bring that to the attention of the Court and the defense counsel, which I did on the morning of January 11th. At that time I made those facts

known to the Court and to the defense counsel, and the defense then filed an oral motion to suppress, in connection with which the Court ordered the Government to turn over to the defendant the logs of the conversations that had been written in the case, and which the Government then did. At that time we conceded and we do concede that the microphones were installed by trespass at the following locations: First, at the residence of Joseph Harley Hootner, Apartment E, 930 North 7th Avenue, Tucson, Arizona, and they were operating from the period January 23, 1961, to March 13, 1961. Such microphones were also installed at the Travelodge Motel, 7370 Sunset Boulevard, Los Angeles, California, and were operated on the two day period January 12 and 13 of 1962. Such microphones were also installed at the residence of the defendant Battaglia at 1938 West Lester Street, Tucson, Arizona, and operated for the period from May 25, 1962 to October 1, 1962, and from May 9, 1963 to August 12, 1963. They were also installed at the Tucson Vending & Amusement Company, 6541 East Tanque Verde Road, Tucson, Arizona, and operated for the period June 18, 1964, until August 7, 1964. Likewise installed at the Tucson Vending & Amusement Company at 2717 East Grant Street, Tucson, Arizona, and operated during the period from September 23, 1964 to November 20, 1964. In connection with these installations, Your Honor, we are informed they were installed on the general authority of the Attorney General, and that they were operated in connection with the FBI's continuing inquiry into organized crime and under the belief that organized crime was being conducted on those premises." (R.H. 20-22)

As we shall demonstrate, the Government took the position that its inventory of its own wrongdoing was binding and conclusive. So that our point is perfectly clear: we believe that the statements made by the attorneys of the Department of Justice reflected their knowledge, as far as it went. Thus Mr. Cunningham told the Court, "There are no tapes" (R.T. 21) and in its written reply to the defendant's motion to suppress, the Government flatly stated: "No tape recording or other original record of these words were made" [referring to words overheard by trespass microphone surveillance] (C.T. 70). If our complaints about the restrictive scope of the hearing really turned upon the exercise of no more than a ceremonial and plainly fruitless right of inquiry, we would still urge that a thorough adversary testing of the Government's conduct is required. Here, however, the perjurious testimony of FBI agent Johnson makes it clear that the police agents, at least, of the Department of Justice were anxious that the full truth should not see the light of day. We let that testimony speak for itself and leave it to this Court whether our characterization of Johnson's testimony as perjurious is a fair one.

Agent Johnson testified:

"A. Yes, sir.

Q. There was no recording equipment? A. No, we did not record it.

Q. At that time? A. No.

Q. Did there come a time when you did record? A. No, we have no tapes.

Q. You did not record it? A. No, I don't recall having recorded any.

Q. Do you have tape equipment for this purpose? A. I don't have any, no."

* * * * *

"Q. (By Mr. Krieger) There is a reference in defendant's Exhibit D in your handwriting? A. Yes.

Q. Is it not? A. Yes.

Q. New tape No. 4? A. Yes.

Q. Am I right? A. Yes.

Q. Was there any tape recording of that conversation? A. No, for the reason that—I can explain as to the tape.

The Court: Go ahead and explain.

A. As to the tapes. We had tape recordings, tape making equipment at the time. However, it did not function, it did not record properly.

Q. All right. How many times did you make tape recorded transcriptions of conversations intercepted in Battaglia's home— A. I didn't—

Q. One moment, let me finish the question. How many times did you make tape recorded or attempt to make tape recorded transcriptions of conversations in Battaglia's home which did not come out? A. I don't remember.

Q. How many times did you try? A. I couldn't tell you exactly the number of times.

Q. Where are old tapes, 1, 2, and 3? A. Probably didn't work, to the best of my knowledge.

Q. You don't know? A. No, There were no tapes.

Q. There were what? A. There were no tapes that were working you could record the conversation.

Q. Where is that equipment? A. I don't know.

Q. What kind of equipment was it? A. You mean —

Q. What was the tape equipment? A. Well, I don't know what the name of it was.

Mr. Cunningham: Your Honor, what difference does it make? They made no tapes. What difference does it make?

The Court: Let him go ahead.

Q. (By Mr. Krieger) What kind of equipment was it? A. I don't know.

Q. Who checked it out? A. Checked it out as to its working?

Q. Yes. A. When I was handling it, I was checking it and it didn't work.

Q. It didn't work? A. No.

Q. So you kept changing tapes? A. Right.

Q. And you wrote down on your log, "A new tape."? A. Right." (R.H. 76, 81-84)

An investigative clerk of the FBI, one Cornet, a fellow listener on the eavesdropping, testified that the tape machine in the Tucson office of the FBI had not worked since 1961 and that nobody had bothered to fix it. Thus according to the Government, during the periods between January of 1961 and August of 1964, when the Government was conducting admitted electronic surveillances of the Battaglia home, business and associates, the tape recording machine remained useless and inoperative. It was an artifact, an objet d'art gracing the Tucson offices of the FBI. This was not a satisfactory state of affairs for Agent Johnson must have wanted to use the machine since he put four different tapes on it in an effort to make it go. Nevertheless the FBI could not mount over that period a technical effort sufficient to repair its tape recorder. We know, of course, from *United States* v. *Black*, 385 U.S. 26 (1966), that the Solicitor General has told this Court of a case in

which the Federal police displayed the technical ability to both make and erase tape recordings.

The scope of counsel's inquiry was sorely limited. This Court in its memorandum in *Black* v. *United States,* 384 U.S. 983 (1966), sought from the Government the following, among other kinds of information: the kind of apparatus used by the Government; the person or persons who authorized its installation; the dates of installation; the use made of the information. At the hearing in the District Court the Court foreclosed an inquiry into the authorization:

> "The Court: Just a minute, counsel. What you want to know is who authorized this particular eavesdropping and I say what materiality that has, I say go on to something else. There is no materiality who authorized this . . ." (R.H. 91-92)

The Court adhered to that ruling (R.H. 93-99), even though it did permit Agent Johnson to testify that he was not the one who authorized the installation (R.H. 125). Petitioner's counsel was blocked from an inquiry into the physical nature of the installation or the location of the surveilling microphones (R.H. 169). The petitioner was prevented from offering the testimony of one Jimmy G. Adcock, a former sergeant of the Tucson police department intelligence unit, who would have testified that an Agent Flynn of the Tucson FBI office, since deceased, had told him during the course of their joint surveillance of Battaglia of the existence of trespass electronic surveillances of Battaglia at locations other than those admitted by the Government. The Government successfully blocked this on the wholly erroneous basis that if was hearsay.

(R.H. 219-227) Petitioner's counsel argued that Flynn's statement to Adcock was an admission against interest, *viz.*, in contradiction of the Government's allegation in the present litigation that it had disclosed all of the bugging directed against Battaglia. FBI Agent Flynn was somebody's agent; clearly he was an agent of the Federal government and his statement made *ante litem motam* which contradicts his principal's assertion later in the litigation is an exception to the hearsay rule. 4 Wigmore: *On Evidence,* 3rd Edition, §§ 1048, 1078.

Petitioner's counsel was prevented from inspecting the file of Agent Johnson's original report which was to become the subject matter of this case and which was filed with the reports of the electronic surveillances under file number 92-152. (R.H. 206-216) Counsel developed an interception of a conversation between Battaglia and his attorney Sobel, who appeared for the defendant as local counsel and counsel of record in this trial. Sobel testified that during the very period of the admitted interception of the conversation between them he had been consulted by Battaglia who was concerned over the possibility of controversey with Greenwell. The Trial Court was strenuously disinterested in the intrusion into the attorney-client relationship: "It shows overhearing what a client and his attorney say, but what materiality?" (R.H. 165). The Court of Appeals was not much more moved:

> "* * * The Government's witnesses, credited by the court, and the logs of what was overhead show an absence of any connection between what was overheard and the indictment and the trial of Battaglia. Surveillance of a conversation between a lawyer and his client may be a particularly obnoxious type

of surveillance, but it still may have nothing to do with the case on trial." Appendix A *infra* 10a.

The Court would not hear evidence which was directed to any but the one question that it viewed as controlling: Was the evidence to be produced at trial by the Government developed from the illicit bugging which the Government admitted?

2. *The issues of law which deserve review.*

(a.) The petitioner Battaglia is entitled to a hearing at which he has a fair opportunity to establish illicit bugging which the Government has not disclosed; certiorari should be granted to set the proper scope of hearings where the Government admits some illicit bugging.

The Government was successful in restricting the hearing and indeed precluding the exploration of the very sorts of factual matters which this Court has required the Government to disclose, as we have indicated above. The crux of the Government's contention in regard to the scope of the hearing was set out in its written reply to the defendant's motion (C.T. 69) and its memorandum on the scope of the hearing (C.T. 75). Relying on *Nardone* v. *United States*, 308 U.S. 338 (1939), the government argued that the scope of the hearing was limited to the government's concessions, and that the defendants could not at the hearing attempt to develop other undisclosed bugs unless they first established the existence of such bugs. Aside from the circularity of such reasoning, it represents a misplaced reading and reliance on *Nardone*. Mr. Justice Frankfurter's opinion makes perfectly clear that the rule is a rule of judicial administration; it was designed to prevent an exploration of the government's evidence before trial. (*Id.* at 342) That rationale, of course, has no applicability here. The government, even

on its theory, was obliged substantially to disclose its evidence and show it to be untainted by its *admitted* taps. Furthermore, the blocked inquiries related not to the substantial evidence to be produced at the trial, but to the techniques, identity and activity of government police agents who were not, and indeed could not have been, called at the trial. The other important rationale is that to give a hearing in every case where there was a naked claim of eavesdropping activity would " * * * subordinate the need for rigorous administration of justice to undue solicitude for potential and, it is to be hoped, abnormal disobedience of the law by the law's officers." (*Id.* at 342) But that rationale is entirely without relevance in this case. The government had admitted its trespass installation of trespass microphones in violation of the Fourth Amendment. This was no interruption of orderly judicial proceedings to see whether the government had possibly indulged in some wickedness; the government had admitted its wrongdoing but insisted that its inventory of the wrongdoing was binding and conclusive upon the defendant. It is understandable that the government should concentrate on its repentance and wish to minimize its wrongdoing.

As this Court noted in its recent decision in the case of *Berger* v. *New York*, 388 U.S. 41 (1967), the peculiar nature of the violation of Constitutional rights involved in electronic eavesdropping requires an especially close scrutiny of the procedures devised by the courts to deal with it. We submit that this is not only true as to the procedures involved in the authorization of such activity (*Berger* v. *New York, supra; Osborn* v. *United States*, 385 U.S. 323 [1966]) but also, we urged, ought to be true as to the hearings held

in connection with the Government's having illicitly engaged in such activity. We respectfully urge that the very questions which petitioner was not permitted to explore represent a bedrock minimum of what the defendant is entitled to develop at a hearing in order to protect his rights: the name of the person who authorized the installation, the identity of the person who made the installation, and the exact location of the devices which were installed. Armed with this information, counsel representing the victim of an electronic bugging will be able to fully and fairly test in the adversary crucible the completenes and candor of the Government's disclosures. Once the Government has admitted its wrongdoing, the defendant should not be tied to the Government's self-serving inventory but should be permitted to pursue the matter fully.

(b.) The Government's electronic intrusion into the relationship between Battaglia and his attorney Sobel, whom he had consulted concerning the subject matter of the investigation and who represented him on this indictment presumptively requires reversal; certiorari should be granted to clarify the decision of this Court in *United States* v. *Hoffa*, 385 U.S. 293 (1966) and to protect the integrity of the attorney-client relationship.

The Court of Appeals treated the intrusion of the attorney-client relationship thus:

> "* * * The Government's witnesses, credited by the court, and the logs of what was overheard show an absence of any connection between what was overheard and the indictment and the trial of Battaglia. Surveillance of a conversation between a lawyer and his client may be a particularly obnoxious type of surveillance, but it still may have nothing to do with the case on trial." Appendix A, *infra*, 10a.

The District Court, however, had only one interest and that was whether or not the Government's evidentiary case was developed from the bugging:

> "Mr. Cunningham: May I point out this was not a hearing between the two; this was only a hearing of what Battaglia said.
>
> The Court: I understand it's what Sobel said. It is what it says it is, and that's it. It's in. Has no materiality at this point." (R.H. 165)

It is perfectly clear from the Court's remarks (R.H. 252-254) at the close of the hearing when the motion was denied that the Court was solely concerned with the question of whether the Government's case was derived from the electronic bugging. At the outset we should note that there is not the faintest suggestion anywhere in the record that Mr. Sobel was engaged in any improper activities of any sort. It is certainly true that the intrusion into the attorney-client relationship did not turn up the Government's case, but Sobel testified that at the very time the Government was doing its bugging and at the locations which were bugged, he had conversations with Battaglia concerning Battaglia's relationship with the complainant Greenwell and the controversy which was later to ripen into this case.

We respectfully submit that despite the fact that in its affirmance in *United States* v. *Hoffa*, 385 U.S. 293 (1966), this Court was at pains to point out that "* * * if the Test Fleet trial had resulted in a conviction instead of a hung jury, the conviction would presumptively have been set aside as constitutionally defective. Cf. *Black* v. *United States* . . ." (*Id.* 307). *Hoffa* has been widely misunderstood to suggest that selective intrusions into the confiden-

tial relationship between lawyers and clients will be found harmless by this Court. It is of course no argument for the Government to assert that it did not intend to pry into the lawyer-client relationship. Surely the Government and not the defendant must bear the burden when the Government's wrongdoing goes further than it had originally contemplated. An attorney legitimately practicing his profession and conferring with a client, whether or not that client is on the organized crime list, is entitled, as is his client, to feel secure from the intrusive snooping of the police. As long as the strongest sanction to be applied is the characterization of the conduct as "obnoxious" there is no reason to believe the police will be discouraged from such activity. Both *Osborn* v. *United States,* 385 U.S. 323 (1966), and *United States* v. *Hoffa,* 385 U.S. 293 (1966) were scrupulously limited by the Court to their special circumstances. They may well not have been generally so understood by some police agents. We respectfully urge this Court to vindicate that meaningful part of the right to counsel which involves confidentiality by granting the writ of certiorari and reversing the conviction.

(c.) This Court in the exercise of its powers of supervision over the administration of justice in the Federal Courts should bar the prosecution of any offense which the Government has sought to discover by illicit electronic intrusions into a man's home.

In our motion filed immediately after we were advised of the existence of electronic surveillances (Notice of Motion, January 13, 1967, C.T. 63-64) and in our brief in the Court of Appeals (Point III, C, page 69), we urged that the indictment be dismissed with prejudice because of the Government's conduct. The Court of Appeals, looking wistfully back to the days of *People* v. *Defore,* 242 N.Y. 13, (1926), rejected our contention. (Appendix A, *infra* 10a-11a.)

Electronic eavesdropping is hardly a constable's blunder. It is by and large an almost wholly undetectable destruction of a man's privacy. By the grace of the Department of Justice, the existence of the surveillance in this and similar cases has been disclosed. It must surely, however, be too late to argue that the Founding Fathers intended the liberty of our citizens to be entrusted to the unerring good faith, restraint and moderation of policemen and prosecutors.

Though Battaglia's counsel continued on a number of occasions to return to the broader questions and referred to Amendments ranging from the Third to the Ninth, the Court typically ignored these contentions and focused on the search and seizure question, e.g., R.H. 140. While the suppression of evidence which is the result of illegal activity on behalf of the government is a remedy, it is by no means the only remedy. Where the Federal government destroys a defendant's rights under the Fifth Amendment by compelling him to testify in the face of a claim of the privilege against self-incrimination, the government is barred from prosecuting him; it must confer "absolute immunity" against further prosecution for the offense to which the question relates. *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), at 585, 586. The vitality and correctness of *Counselman* in stating the Federal standard was recently affirmed in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965). Though as a matter of abstract logic the sanction for the violation of the Fifth Amendment right to silence could be a mere prohibition of the use of evidence derived from that violation, that is, a requirement on the government to show an untainted source for its case [cf. *Malloy* v. *Hogan*, 378 U.S. 1 (1964) and *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964)], neverthe-

less it is firm Constitutional doctrine that a Federal invasion of the Fifth Amendment privilege bars prosecution in the area of the invasion, whether or not the case comes from an independent source. We think that that is the appropriate remedy here. The intrusions into Battaglia's office, and more importantly into his home, over so long a period of time, offend against his rights to be free of a general search, *Berger* v. *United States,* 388 U.S. 41, 59 (1967), and destroyed the privacy and sanctity of the home and marriage which the Third, Fourth, Fifth and Ninth Amendments taken together set beyond the reach of state power. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). We submit that only a flat bar to prosecution will be an effective deterrent and an adequate vindication of the defendant's rights against electronic bugging. The special vice of such snooping is that, unlike the search by police for tangible objects, the victim is unaware of the violation of his rights. We submit that where the defendant is so peculiarly at the mercy of the government to inventory its own wrongdoing, the rule of the immunity cases rather than the rule of the search cases is the proper and effective one. In this case the bugs were maintained well into the period of the events covered by this investigation, and maintained with a specific view to prosecuting Battaglia under the very statute for which he stood trial. He had been the target of Agent Johnson's investigations since before 1961 and sometime prior to June 1963 his name appeared on an official list which came to Agent Johnson's hands (R.H. 216-219).

We respectfully ask this Court to require the Solicitor General to deliver to it all of the logs of the admitted eaves-

dropping, which by agreement of all counsel have been in the custody of the Department of Justice.

An examination of those logs will demonstrate the extensive and offensive intrusion into the purely personal lives of the defendant and his wife which, according to the Department of Justice, served no law enforcement purpose. Only a radical remedy can effectively restrain police agents from their prurient electronic interests.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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